

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C.

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Docket No. CAA-93-H-002

ENVIRONMENTAL

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Complainant-Appellant,

-v-

COMMERCIAL CARTAGE COMPANY, INC.

Respondent-Appellee.

BRIEF FOR COMPLAINANT - APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether Commercial Cartage violated § 211 of Clean Air Act, ("CAA") 42 U.S.C. § 7545(h), and the Volatility Regulations ("regulations") issued thereunder, at 40 C.F.R. § 80.27(a), by transporting gasoline with a Reid vapor pressure ("Rvp") in excess of the 7.8 pounds per square inch ("psi") Rvp standard.
2. Whether Complainant detected violations of § 211 of the CAA, 42 U.S.C. § 7545(h), and § 80.27(a) of the regulations within the meaning of § 80.28(b)(1), by examining at the carrier's office bills of lading and delivery tickets that were exchanged between the parties and by using the terminal's test results from whom the carrier received the gasoline. Where the bills of lading that the carrier signed and used to transport the gasoline stated that "GASOLINE NOT MARKETABLE IN 7.8 RVP CONTROL AREAS," where the terminal's test results showed that the Rvp of the gasoline ranged between 8.2 psi and 8.5 psi, where EPA's test results at the retail outlet on September 4, 1992 showed that the Rvp of the gasoline was in excess of 8.1 psi, and where the delivery tickets and the bills of lading indicated that the carrier transported the gasoline to Foristell, Missouri, a 7.8 Rvp control area.
3. Whether Complainant detected eleven (11) violations of § 211 of the CAA, 42 U.S.C. § 7545(h), and § 80.27(a)(2) of the regulations within the meaning of § 80.28(e)(3), by examining at the branded retail outlet the bills of lading that were exchanged between the parties, by using the terminal's test results from where the carrier transported the gasoline to the retail outlet, and by sampling the gasoline at the retail outlet on September 4, 1992. Where the bills of lading that the carrier signed and used to transport the gasoline stated that "GASOLINE NOT MARKETABLE IN 7.8 RVP CONTROL AREAS," where the terminal's test results showed that the Rvp of the gasoline ranged between 8.2 psi and 8.5 psi, where EPA test results at the retail outlet on September 4, 1992 were in excess of 8.1 psi, and where the delivery tickets and the bills of lading indicated that the carrier transported the gasoline to the branded retail outlet, located in Foristell, Missouri, a 7.8 Rvp control area.
4. Whether Commercial Cartge has a legal duty under § 211 of the CAA, 42 U.S.C. § 7545(h), and § 80.27(a)(2) of the regulations, not to transport gasoline that exceeds the applicable standard.

5. Whether Commercial Cartage breached its legal duty not to transport gasoline that exceeded the applicable standard with respect to eleven (11) violations detected at the retail outlet and therefore caused these eleven (11) violations of § 80.28(e)(3)

STATUTORY AND REGULATORY BACKGROUND

The volatility regulations, at 40 CFR 80.27 and 80.28, promulgated on March 22, 1989, regulate the volatility of gasoline during the summer months. The regulations were designed as a major step to reduce the Nation's ozone problem. The volatile organic compounds (VOC's) generating from evaporating high Rvp gasoline are a significant contributor to the ozone problem. 54 Fed. Reg. 11868.

The regulations provide that each volatility season, all parties other than retailers and wholesale purchaser-consumers (e.g., refiners, terminals, carriers and distributors) must comply with applicable standards from May 1 (during 1989 only - June 1) through September 15, while all parties, including retailers and wholesale purchaser consumers, must be in compliance from June 1 (during 1989 only June 30) through September 15. The 1989 rulemaking was "Phase I of a two-phase reduction."

The regulations established a liability scheme similar to that used in the unleaded fuels regulations (40 CFR 80.22 and 23). This scheme generally presumes liability not only on facilities where violations are discovered, but also on many of

the parties upstream in the chain of distribution. Both the presumptive and vicarious liability aspects of this scheme have withstood Court challenge. See Amoco Oil Co. v. EPA, 543 F. 2d 270 (D. C. Cir. 1976), National Tank Truck Carriers, Inc. v. EPA, 907 F. 2d 177 (D. C. Cir. 1990). The scheme is also one of joint and several liability since, depending on the circumstances of each case, more than one party may be liable for a particular violation. The regulation describes how the various parties can establish defenses to the presumptions of liability.

The only upstream party not automatically presumed liable under the regulations is the carrier. "Carrier means any distributor who transports or stores or causes the transportation or storage of gasoline without taking title to or otherwise having any ownership of the gasoline . . ." 40 CFR 80.2(t). Carriers are only **presumed** liable for violations discovered at their own facilities. For all violations where the carrier is part of the chain of distribution, it is only in violation where the EPA can show that the carrier **caused** the violation. The Agency specifically recognized that a carrier's handling of gasoline product could cause a volatility violation, stating that a carrier could, for example, "intentionally or negligently" take gasoline intended for one RVP area, and route it to another RVP area. 54 Fed. Reg. 11875.

For violations committed at the carrier's own facility, the

carrier is presumed liable. 40 CFR 80.28(a). A "carrier facility" includes a transport vehicle, such as its delivery truck. 40 CFR 80.27(a) includes as a prohibited activity, the transporting of gasoline whose Rvp exceeds the "applicable standard", and defines "applicable standard" as "the standard listed in this paragraph [since amended to the current standards] for the geographical area and time period in which gasoline is intended to be dispensed to motor vehicles."

On June 11, 1990, EPA promulgated "Phase II" of the volatility regulations. 55 Fed. Reg. 23658 et seq. This action did not change the liability, sampling or testing provisions of the 1989 regulation. The principal effect of Phase II was to generally tighten the applicable standards, beginning with the 1992 volatility season, and to make them generally more uniform within each state during the high-ozone season. Thus, while all states (except Alaska and Hawaii) required upstream parties to meet a 9.0 psi standard in May, 26 states, generally in the North, are required to meet a 9.0 psi standard from June 1 through September 15. The remaining 22 contiguous states and the District of Columbia were required by this rulemaking to meet a standard of 7.8 psi from June 1 through September 15.

While one of the intentions of EPA in setting these new standards was to have a uniform standard within each state (the 1989 regulation imposed multiple standards on several states),

Congress, in amending the Clean Air Act in 1990, required that EPA regulations not impose an Rvp standard below 9.0 psi in any attainment area. Since every state on which the 1990 rulemaking had imposed a standard of 7.8 psi either contained both attainment and non-attainment areas or were totally attainment areas, EPA had to amend the regulation once again. Thus, on December 12, 1991, EPA finalized a rule "eliminating federal sub-9.0 psi requirements for those areas where EPA no longer has the authority to adopt such levels" and "setting the Phase II RVP limit for gasoline at 9.0 psi in all areas not designated ozone nonattainment" 56 Fed. Reg. 64704, 64708. As a result, the 7.8 psi standard applies in "southern" non-attainment areas, all of which are significant metropolitan areas bordered at some point by areas where the 9.0 psi applies. The St. Louis, Missouri non-attainment area, which including Foristell, Missouri, is subject to the 7.8 psi standard.

NATURE OF THE CASE

The presiding officer's initial decision eliminates or severely restricts carrier responsibility and liability imposed under the EPA's fuels regulations. The initial decision deprives the nation of a vital means to prevent noncomplying gasoline from reaching the motorists and harming the environment. The carrier often is the last link in the gasoline distribution chain before

the gasoline reaches the motorists¹. The carrier's cooperation and duty to exercise due care under the Clean Air Act and EPA's fuels regulations are therefore needed and valued. The carrier's duty to exercise due care and prudence to prevent itself from transporting gasoline that exceeds the applicable standard may be the last opportunity to identify the apparent Rvp errors or mistakes of its well meaning and credible shippers and/or identify an unscrupulous party who would market 9.0 Rvp gasoline in a 7.8 Rvp control area. Contrary to the presiding officer's decision, the carrier need not conduct its own sampling and testing of gasoline but need only make reasonable efforts to ensure that the gasoline he is transporting is appropriate for the area where he transports the gasoline, and need only take reasonable precautions to prevent himself from transporting noncomplying gasoline. The carrier can comply with this objective standard of due care by creating corporate compliance assurance policies that promote and encourage compliance with the Clean Air Act and the fuels regulations. By training key personnel, including those who transport, dispatch, or arrange for the transportation of the gasoline, to distinguish 9.0 Rvp control areas from 7.8 Rvp control areas, by training key personnel to communicate and ask the shipper/supplier and terminal about the applicable Rvp standard for the gasoline, by

¹ The shipper or an upstream party frequently owns the retail outlet.

training and instructing key personnel to examine bills of lading or product transfer documents to ensure that the gasoline meets the applicable standard, and by providing to key personnel tools or aids, such as, a map to distinguish 9.0 Rvp control areas from 7.8 Rvp control areas. These efforts include establishing communication safeguards between the arrangers and contractors, between the shipper's dispatcher and the carrier's dispatcher, between the terminal and the carrier, and the carrier and the retail outlet to prevent 9.0 Rvp control gasoline from reaching 7.8 Rvp control areas. These up front reasonable efforts do not include sampling and testing.

The presiding officer's opinion that "[i]t is unrealistic, if not totally unreasonable, to expect that a carrier not having storage facilities, in possession of the gasoline for a few hours at most, and operating on the margins shown by this record could or would engage in periodic sampling and testing is not correct." [Initial Decision, pg. 38]. The presiding officer fails to consider that for the same reasons that he has given it is equally as "unrealistic, if not totally unreasonable" to require EPA to sample and test the gasoline from the carrier's tank truck. Rather, Complainant must be able to use the current and reliable tests results of others and the commercial documents that exchange hands between the parties to the transaction to identify and trace the gasoline to the liable parties and their

facilities. Contrary to the presiding officer's conclusion, the regulations clearly contemplated that a regulated party could use these commercial documents to show that it did not cause a violation, and the converse is true as well. Therefore, the presiding officer has committed reversible error in restricting when, how, and where violations of § 80.27(a)(2) may be detected.

The presiding officer also fails to consider that the periodic sampling and test requirement is an affirmative defense provision², which enables the carrier to avoid liability where EPA has already detected a violation of the applicable standard at the carrier's facility. At this juncture, EPA has determined that (i) the carrier did not take reasonable steps - did not exercise due care, and (ii) that current and reliable test results show that the gasoline exceeded the applicable standard for the area where he transported the gasoline. Therefore, the carrier is presumed liable for the violations detected at his facility. In order to avoid liability the carrier must then meet his affirmative defense by demonstrating (i) evidence of an oversight program conducted by the carrier, such as periodic sampling, for monitoring the volatility of gasoline stored or transported by that carrier; and, (ii) that the violation was not caused by the carrier or his employee or agent. In providing guidance on what is an acceptable oversight program for a "motor"

² National Tank Truck Carriers, Inc. ("NTTC") vs. EPA, 902 F. 2d 177, (D.C. Cir. 1990).

carrier, EPA stated in the 1992 edition of EPA's Question and Answer Document ("Q&A Document") that the truck carrier could arrange and rely on the terminal's sampling and test results³. [Q&A Document, p. 18, Q&A # 6].

According to the presiding officer, the volatility

³ **Question:** What constitutes an acceptable oversight program for pipeline and motor carriers; is testing required?

Answer: Both pipeline carriers and motor carriers are presumptively liable for violations detected at their facilities. To rebut this presumption, both types of carriers have to demonstrate (in addition to the other defense elements) an oversight program concerning the product which is carried. Such an oversight program does not necessitate testing each load or batch of gasoline but envisions a program such as periodic sampling and testing. The frequency of testing would depend on factors such as the size of the loads or batches, and larger loads or batches would justify more frequent testing. The oversight requirement applies to commingled product, as well as product received from a single source.

In particular, motor carriers could have a valid oversight program without actually testing the product themselves. For example, they could arrange with the owner of the product to do periodic testing of the gasoline immediately before or after delivery and could use these test results as a basis for oversight. Such an alternative oversight program may be particularly appropriate for a carrier who delivers product that does not pass through a facility owned or operated by him.

Pipeline carriers, on the other hand, normally transport batches of gasoline through their own facilities which are very large, so that testing of every batch by the pipeline operator may be necessary. Factors relative to the appropriate frequency of sampling for a pipeline include the following: a) the results of previous sampling (the discovery of gasoline having excessive volatility would necessitate increased sampling frequency); b) the volume of product being moved (the larger the volume of a batch, the greater the justification for sampling and testing that batch); c) the degree of confidence the pipeline has in the representations made by the company providing gasoline to the pipeline; and d) the opportunity for increased volatility due to commingling with higher volatility product in the pipeline.

regulations contemplated that detection at the carrier's facility would be sampling and testing from the carrier's tanks. [Initial Decision, pg. 39]. This finding is contrary to the regulations itself. In brief, the preamble to the volatility regulations, 54 Fed. Reg. 11868, 11872, March 22, 1989, states that

"the carrier's handling of the product can nevertheless result in violations. For example, ... product that was intended to be delivered in one RVP area (e.g., an area which a Class C standard) may be intentionally or negligently re-routed by the carrier to another RVP area (e.g., an area with a Class B standard). This re-routing of the gasoline could result in the gasoline not complying with the applicable standard for the area." 54 Fed. Reg. 11875 (emphasis added).

The preamble to the volatility regulations also states that

"[t]he regulations as proposed and promulgated define the applicable RVP standard as the RVP standard applicable to the geographic area and time period the gasoline is intended to be dispensed to motor vehicles. ... When conducting investigations, EPA will review any such designations, along with shipping documents ... concerning where and when the party intended the product to be dispensed to motor vehicles. The burden will be on parties to provide clear evidence on this issue, or else the presumption of the most stringent standard will apply." 54 Fed. Reg. 11871.

The preamble further states that **"in addition to the paper certification** advocated by commenters, the final rule requires an oversight program which includes periodic testing of product." 54 Fed. Reg. 11872, 11873 (emphasis added).

Finally, the presiding officer's initial decision requires proof of the violations, not by a preponderance of the evidence, but by an absolute certainty. The initial decision does not allow any circumstantial evidence such as bills of lading and testing conducted by the terminal from which the gasoline was picked up to be used in Complainant's prima facie case. Rather, in order to show a violation of § 80.27(a) based on § 80.28(b) and/or (e), the ALJ would require the Complainant to sample and test the gasoline from the carrier's tank truck.

RELEVANT FACTS TO ISSUES PRESENTED

In the Amended Complaint⁴, EPA alleged eleven counts of violation of 40 C.F.R. § 80.27(a)(2), under three claims of relief (the last claim being in the alternative to the first two): First, EPA alleged that Commercial Cartage was liable for nine (9) counts of violating § 80.27(a)(2) based on § 80.28(b), by transporting to a branded retail outlet, located in an area subject to a Rvp standard of 7.8 psi, nine (9) loads of premium and regular unleaded gasoline that had a Rvp that exceeded the 7.8 psi standard and specifically designated by HWRT as not marketable in 7.8 Rvp control areas. Second, that Commercial Cartage was liable for two (2) counts of violating § 80.27(a)(2) based on § 80.28(e), by transporting premium and regular unleaded

⁴ Although the Amended Complaint did not allege § 80.28(b) claims and § 80.28(e) claims in the alternative, the basis for the penalty was not twenty violations..

gasoline that had a Rvp that exceeded the 7.8 psi standard and that was specifically designated by HWRT as not marketable in 7.8 Rvp control areas, Commercial Cartage caused the regular unleaded and premium gasoline at the branded retail outlet to be in violation of the Rvp standard on September 4, 1992. In addition, the amended complaint alleged, in the alternative, that Commercial Cartage is liable for nine (9) counts of violating § 80.27(a)(2) based on § 80.28(e), for causing the regular unleaded and premium gasoline at a branded retail outlet to be in violation of the Rvp standard as a result of each delivery of loads of gasoline that exceeded the Rvp standard.

In order to prevail on its first claim of relief, Complainant must show by a preponderance of the evidence that the gasoline exceeded the 7.8 psi applicable standard, Commercial Cartage transported the gasoline to a 7.8 Rvp control area, and Complainant detected the violations at Commercial Cartage's facility.

In order to prevail on the second claim and third, alternative, claim of relief, Complainant must show by a preponderance of the evidence that it detected eleven (11) violations at the branded retail outlet, St. Louis W 70, and that Commercial Cartage caused the eleven (11) violations.

According to the evidence adduced from the Administrative Hearing, on September 3-4, 1992, agents of the United States

Environmental Protection Agency conducted three pertinent inspections in the St. Louis area to determine compliance with the volatility regulations.

- A. Commercial Cartage committed nine (9) violations of § 80.27(a)(2) based on § 80.28(b).

On September 3, 1992, the agents inspected the Hartford Wood River Terminal ("HWRT"), a petroleum products terminal located at 900 N. Delmar, Hartford, Illinois. HWRT is located in a 9.0 Rvp control area. During the HWRT inspection, the agents reviewed and copied bills of lading and test data, and interviewed HWRT's personnel and recorded their statements. As a result of this inspection, Complainant determined the following:

a. All incoming batches of regular unleaded gasoline were stored in Tanks 80-10 and 80-7, and all incoming batches of premium gasoline were stored in Tank 80-9. Only Tank 80-10 was used to supply regular unleaded gasoline and only Tank 80-9 was used to supply premium gasoline to the truck racks or downstream parties. [Weber, Tr. 1, p. 88, 93, 131-133, 138; Comp. Ex. 1]. HWRT sampled and tested all the incoming shipments of gasoline approximately two hours after the gasoline had been placed in Tanks 80-10, 80-9 and 80-7 to verify its compliance with Rvp specifications. [Tr. 1, p. 87]. HWRT sampled and tested the gasoline according to the sampling and testing methodologies

Cartage's delivery tickets with the bills of lading. [Comp. Ex. 2, Simpkins, Tr. 1, p. 23 - 42]. The delivery tickets and the bills of lading went hand in hand. See Section III, infra. The bills of lading, which had been signed by Commercial Cartage and used by Commercial Cartage to transport the gasoline and collect its payment for the transportation of the gasoline, showed that the gasoline was not marketable in 7.8 Rvp control areas. The delivery tickets and the bills of lading also showed that Commercial Cartage transported the gasoline to a branded retail outlet, located in a 7.8 Rvp control area, between June 1 and September 15th: on June 5th (two loads), June 12th, June 17th, June 23rd, July 20, July 24th, and August 31st (two loads).

k. The inspectors then approached Mr. Kenneth Baer with their findings. [Simpkins, Tr. 1, p. 42 lines 4 -11]. Mr. Baer informed the inspectors, as indicated by Comp. Ex. 10, that Commercial Cartage did not know that there were 9.0 Rvp control areas and 7.8 Rvp control areas.

l. As a result of the Commercial Cartage inspection, Complainant determined that during June 1992 through August 1992, Commercial Cartage picked up by its transport vehicle from HWRT nine (9) loads of premium and regular unleaded gasoline. According to HWRT's test results and the testimony of HWRT's terminal manager, Mr. Weber, the Rvp of the gasoline ranged

between 8.2 psi and 8.5 psi on the dates that Commercial Cartage transported the gasoline from HWRT to the branded retail outlet. Each of these loads had an Rvp of over 7.8 psi and were designated on the bills of lading as "Gasoline Not Marketable In 7.8 Rvp Control Areas".

m. The trucks or transport facilities used by Commercial Cartage for the transportation of gasoline were transport vehicles and thus carrier facilities within the meaning of § 80.28(b). In addition, Commercial Cartage's office was a carrier facility within the meaning of § 80.28(b).

Therefore, Complainant has demonstrated by a preponderance of the evidence that the gasoline exceeded the 7.8 Rvp applicable standard, Commercial Cartage, in violation of § 80.27(a)(2), transported nine (9) loads of the gasoline to a 7.8 Rvp control area, and EPA detected the violations at Commercial Cartage's facility within the meaning of § 80.28(b).

B. Commercial Cartage Caused Eleven (11) Violations of 40 C.F.R. § 80.27(a)(2) at the Branded Retail Outlet.

After conducting the Commercial Cartage inspection, the inspectors conducted an inspection at St. Louis W 70, the branded retail outlet. At the branded retail outlet, the inspectors identified themselves and requested permission to sample the gasoline and review bills of lading. [Simpkins, Tr. 1, p. 44

lines 16-24, p. 45 lines 1]. The inspectors took a Fuels Field Inspection Report # 1035982 at the retail outlet. [Simpkins, Tr. 1, p. 46 lines 8-10; Comp. Ex. 4]. The report indicates that the inspectors sampled the premium and regular unleaded gasoline and forwarded the samples to EPA's National Vehicle Emissions Lab ("NVEL") for analysis. The report also indicates that the last delivery of gasoline to the retail outlet was on August 31, 1992.

As a result of inspecting the branded retail outlet, Complainant determined the following:

a. The premium and regular unleaded gasoline exceeded the applicable standard. [Tr. at 44-47, 175-176, Comp. Ex. 5]

b. The premium and regular unleaded gasoline did not contain any alcohol. [Comp. Ex. 5]

c. As described under Section I, above, Commercial Cartage transported the nine (9) loads of noncomplying premium and regular gasoline to the retail outlet;

d. The last delivery made to the branded retail outlet prior to EPA's inspection was made by Commercial Cartage on August 31, 1992, as evidenced by bill of lading # 071385, Comp. Ex. 2; the matching Commercial Cartage delivery ticket, Comp. Ex. 3-F; and the Fuel Field Inspection Report # 1035982, Comp. Ex. 4.

e. Commercial Cartage transported the gasoline to the branded retail outlet, and no other carrier was shown to have

transported gasoline to the branded retail outlet between June 1 and September 4, 1992. See discussion under Section VI.

f. As discussed in Section V, infra, Commercial Cartage did not exercise due care or make reasonable efforts to ensure that it was not transporting gasoline that exceeded the applicable standard to St. Louis W 70.

Therefore, the evidence shows that EPA detected two (2) violations at the retail outlet on September 4, 1992, by means of sampling and testing the premium and regular unleaded gasoline, and that Commercial Cartage caused these two (2) violations by not exercising due care and prudence and as a result transported the noncomplying gasoline to the retail outlet. The evidence also shows that EPA detected nine (9) additional violations at the retail outlet from the examination of bills of lading and delivery tickets that had been signed by Commercial Cartage and the cashier at the retail outlet and by HWRT's testimony and test results of the gasoline that Commercial Cartage transported from HWRT. The evidence further shows that Commercial Cartage caused the nine (9) violations by not exercising due care and prudence, and as a result transported the nine (9) loads of noncomplying gasoline to the retail outlet.

ARGUMENT

A. EPA may detect a violation at the carrier's facility within the meaning of § 80.28(b) by means other than sampling and testing the gasoline from the carrier's tank, in this instance Commercial Cartage's tank truck.

The presiding officer has erred in concluding that "EPA can 'detect a violation at the carrier's facility' within the meaning of § 80.28(b) only by sampling and testing gasoline from the carrier's tank, in this instance CCC's tank truck." See Initial Decision, p. 42. For the detection of a violation, the primary concern is whether or not the party has committed a prohibited act, not where the physical evidence of the violation is located. The volatility regulations and the enforcement guidance that EPA provided to the regulated community do not support the presiding officer's conclusions that a violation can only be detected through sampling and testing of gasoline at the carrier's facility. The volatility regulations do not specify when or how violations will be detected. That is, how EPA will investigate, uncover, discover, or find violations⁵. The

⁵ EPA notes that the regulations do not define the term "detect". In such absence, we must defer to the common usage of the term. Words and Phrases, 12th Edition (1954) provide that,

To 'detect' is to uncover; to discover;
to bring to light; as to 'detect' a crime,
or a criminal (Web. Dict.). It means to
uncover; lay bare, show (Cent. Dict.).
Cullinan v. Furthman, 79 N.E. 989, 990,
187 N.Y. 160.

EPA contends that this is the definition of "detect" as used in the regulations at § 80.28, which provides that "Where a violation of the applicable standard set forth in § 80.27 is detected at"

regulations merely state that, "during the 1992 and later high ozone season no person, including without limitation, no carrier . . . shall sell, offer for sale, dispense, supply, offer for supply, transport or introduce into commerce gasoline whose Reid vapor pressure exceeds the applicable standard." 40 C.F.R. § 80.27(a)(2).

The preamble to the volatility regulations, 54 Fed. Reg 11868, and the Q & A Document, clearly indicate that EPA intended to detect a violation by means other than sampling and testing. These means include investigating each party in the gasoline distribution system, taking testimony, and reviewing bills of lading and other commercial documents. Moreover, the regulations clearly intended for carriers to be held liable for violations where EPA was not present and on the scene to sample and test gasoline. This is embodied in the concept that a carrier's handling of the product can result in violations. Some violations such as re-routing, commingling, misdeliveries, etc., may only be detected by investigations involving the examination of bills of lading or other commercial documents and interviewing parties in the gasoline distribution network. EPA also stated in the preamble to the volatility regulations that:

The regulations as proposed and promulgated
define the applicable RVP standard as the RVP

standard applicable to the geographic area and the time period in which the gasoline is intended to be dispensed to motor vehicles. . . . When conducting investigations, EPA will review . . . shipping documents . . . concerning where and when the party intended the product to be dispensed to motor vehicles. The burden will be on parties to provide clear evidence on this issue, or else the presumption of the most stringent standard will apply. 54 Fed. Reg. 11870, 11871 (emphasis added).

Moreover, even if tests were required, tests did exist both at HWRT of the gasoline picked up by Commercial Cartage, and at the retail outlet of the gasoline sampled and tested by EPA. These test results evidence that the Rvp of the gasoline that Commercial Cartage transported exceeded the applicable standard. [Comp. Ex. 1, Tr. 1, p. 93-104].

According to the presiding officer's ruling, in order for a carrier to be liable under § 80.28(b), EPA must have been present at the retail outlet and sampled and tested the gasoline from the truck at the retail outlet⁶. Because the carrier usually hold the gasoline for a couple of hours only, it would be virtually impossible for EPA to ever detect a violation at a carrier's facility through sampling and testing alone. It is a long standing tenet of statutory construction that a statute or regulations should not be interpreted in a manner that renders it

⁶ The violation is the transportation of 9.0 Rvp control area gasoline to a 7.8 Rvp control area. Therefore, the violation is not completed until the carrier delivers the gasoline to the branded retail outlet, the 7.8 RVP control area.

meaningless. Silverman v. Eastrich Multiply Investor Fund, 51 F.3d 28 (3rd Cir. 1995); Black & Decker Corp. v. C.I.R., 986 F.2d 60 (4th Cir. 1993); and U.S. v. Eastern of New Jersey, Inc., 770 F.Supp. 964 (D. N.J.1991).

B. The regular unleaded gasoline stored in HWRT's Tank 80-10 and the premium gasoline stored in Tank 80-9 was representative of the gasoline that HWRT transported to the branded retail outlet, located in a 7.8 Rvp control area.

The presiding officer erred in finding that while the evidence shows that HWRT sampled and tested its gasoline using the prescribed method, § 80.27(b), "the HWRT tests do not establish the Rvp of the gasoline on the dates and at the point it was drawn to fill Commercial Cartage's tank trucks because of the possibility of evaporation, e.g., from the open hatch from which samples were drawn, and the likelihood of stratification (findings 10, 11). [Initial Decision, pg. 41-42].

First, there is no evidence that gasoline evaporated from the tanks. In addition the presiding officer's finding of a possibility of evaporation from an "open" hatch from which samples were drawn is not supported by any evidence. The record does not indicate the tanks were equipped with an "open" hatch. HWRT's terminal manager, Mr. Weber, testified that the hatch could be open and that samples were taken from the top of the tank from an 8 inch hatch. [Tr. 1 p. 118 lines 10-20]. HWRT's laboratory technician, Mr. Stack, testified that in taking a sample he gets on the roof of the tank and there is a hatch he

can open. [Stack, 147 line 14]. Therefore, the record does not show that the hatch was open, but closed, and the presiding officer has erred in finding that evaporation occurred when there is no evidence to support this finding.

In fact, the record shows that HWRT's tanks were designed to prevent evaporation. 40 C.F.R. § 60, Subpart K. Mr. Weber testified that HWRT's tanks had a floating roof that sat on the gasoline, were equipped with a pressure relief valve and a hatch, and were sealed along the edges with a primary and a secondary seal. [Tr.. 1 p. 119 lines 20-24, p. 120 lines 1-15]. The theory behind the floating roof tank is that the roof floats with the level of gasoline in the tank and sits on the gasoline. This minimizes the space above the gasoline, and evaporation is minimized, and vapor pressure is maintained along with light ends and octane, while vapor space [the vacuum], evaporation, water condensation and water contamination are minimized. Refiners and terminals are motivated by a market incentive to maintain light ends and octane and to decrease water contamination because these elements affect the quality and cost of the gasoline. Since vapor pressure cannot be separated from light ends and octane, vapor pressure is maintained.

Second, the presiding officer erred in finding that the incoming batch of premium unleaded gasoline before being stored in Tank # 80-9 had a Rvp of 7.2 psi on June 1st, and that the

incoming batch of regular unleaded gasoline before being stored in Tank # 80-10 or 80-7 had a Rvp of 7.0 psi on June 1st, 7.2 psi on July 27th, 7.0 psi on August 10, and 7.1 psi on August 26th, because the record does not reflect that HWRT used the prescribed § 80.27(b) pipeline sampling methodology. Messrs. Weber and Stack neither testified that HWRT used the required "continuing sampling" method, nor does the record reflect that the continuing sampling procedures were used in retrieving pipeline samples. Messrs. Weber and Stack testified that HWRT's took a sample from the pipeline as the gasoline came into the terminal. Mr. Weber testified that when a shipment started up, a lab person would retrieve a sample off the pipeline itself, as the gasoline came in and would take the sample back to the lab and conduct the tests. [Weber, p. 86 line 18-21]. Messrs. Weber and Stack testified that the pipeline sample was taken from a valve on the pipeline, a sample box, that resembles a water spigot. [Weber, p. 87 line 21-24, Stack, p. 143 lines 1-15].

This pipeline sample only represents a single spot in the pipeline of an incoming batch of gasoline. Mr. Weber testified that several thousand barrels come in after sampling, and that it takes several hours to complete a delivery. [Weber, p. 136 line 5-19]. The volatility regulations state that the only way to accurately represent a pipeline receipt or batch is to conduct a continuous sampling. 40 C.F.R. Part 80, App. D. para. 11.4. A

continuous sample is one obtained from a pipeline in such a manner as to give a representative average of a moving stream. See 40 C.F.R. Part 80, Appendix D, 3.12. The evidence shows that HWRT's pipeline sample did not represent the Rvp of the entire batch of gasoline coming into the terminal. Mr. Weber testified that this is why HWRT took the running sample from the tank after the gasoline settled. Therefore, since the evidence does not show that a "continuous sample" was taken, the presiding officer erred in finding that the incoming pipeline batch of premium unleaded gasoline had an Rvp of 7.2 psi on June 1st, the batch of regular unleaded gasoline had an Rvp of 7.0 psi on June 1st, 7.2 psi on July 27th, 7.0 psi on August 10, and 7.1 psi on August 26th.

HWRT has explained that the Rvp of the gasoline stored in Tanks 80-10, 80-9, and 80-7 changed according to the volume of product in the tank before delivery and the volume of product delivered into the tanks. [Weber, 105 lines 1-5]. The evidence does not show these critical volumes of gasoline. Mr. Weber has further testified that HWRT's gasoline was not to be marketed in 7.8 Rvp control area and that HWRT's gasoline exceeded the 7.8 Rvp standard as follows:

Counts	Date	Gasoline	Rvp	Exceeds Standard By
1	6/05/92	Unleaded	8.3 psi	.50 psi [8.3 - 7.8]
2	6/05/92	Premium	8.2 psi	.40 psi [8.2 - 7.8]

3	6/12/92	Premium	8.2 psi	.40 psi	"	"
4	7/17/92	Premium	8.2 psi	.40 psi	"	"
5	6/23/92	Premium	8.2 psi	.40 psi	"	"
6	7/20/92	Unleaded	8.5 psi	.70 psi	[8.5 - 7.8]	
7	7/24/92	Unleaded	8.5 psi	.70 psi	"	"
8	8/31/92	Unleaded	8.2 psi	.40 psi	[8.2 - 7.8]	
9	8/31/92	Premium	8.3 psi	.50 psi	[8.3 - 7.8]	

[Weber, p. 106 lines 5-24, p. 107 lines 1-10, p. 137 lines 21-24. p. 93-104; Comp. Ex. 1.].

Third, the presiding officer's finding based on the possibility of evaporation and stratification is not supported by the evidence or the volatility regulations. In *New Waterbury, LTD*, TSCA Appeal No. 93-2, at 19 (Oct. 20, 1994), the EAB stated that an "inference, however, must rest upon a factual basis in the record. 29 Am. Jur. 2d Evidence § 182 (citing *Computer Identics Corp. v. Southern Pacific Co.*, 756 F. 2d 200 (1st Cir. 1985) . . . If an unwarranted inference receives the blessing of the presiding officer, . . . grounds exists for reopening the hearing on the question of whether the fact inferred is true. 66 C.J.S. New Trial § 36 (1950)."

The presiding officer's ruling is also reversible error because (1) it presumes that gasoline two feet from the bottom of the tank where the rack is fed is in compliance even if the refiner and/or distributor's current and reliable test results on the whole tank of gasoline shows that the tank is out of compliance; (2) it presumes that any gasoline above two (2) feet from the bottom of the tank never leaves the tank; and (3) it permits carriers to transport gasoline to consumers in total

disregard of the refiner's and distributor's test results and representation concerning the applicable standards. According to the presiding officer, so long as the gasoline in the carrier's tank is not sampled and tested by EPA, the gasoline is presumed in compliance and the carrier is free to transport 9.0 Rvp gasoline to a 7.8 Rvp control area.

In summary, HWRT stored all incoming batches of regular unleaded gasoline in Tanks 80-10 and 80-7 and all incoming batches of premium gasoline in Tank 80-9. Only Tanks 80-10 and 80-9 were used to supply the rack or downstream parties. [Tr. 1, p. 88, 93, 131-133, 138; Comp. Ex. 1]. HWRT sampled and tested the gasoline stored in Tanks 80-10, 80-9, and 80-7 according to the sampling and testing methodologies specified at 40 C.F.R. § 80.27(b). [Tr. 1, 87]. The HWRT's Log Book shows, Comp. Ex. 1, and HWRT's terminal manager, Mr. Weber, has testified that there were no incoming batches of gasoline to Tanks 80-10, 80-9, and 80-7 between the time samples were drawn and shown to be in excess of 8.1 psi and the nine (9) times cited in the Amended Complaint that gasoline was loaded into Commercial Cartage's truck for delivery to the branded retail outlet located in a 7.8 Rvp control area. [Tr. 1 93-104]. Carriers by definition and presumption in the regulations do not alter either the quality or quantity of the gasoline. Therefore, Complainant has demonstrated by a preponderance of the evidence that HWRT's

gasoline exceeded the 7.8 psi applicable standard on the dates that Commercial Cartage transported the gasoline from HWRT to the retail outlet.

C. The Bills of Lading Were Commercial Cartage's Copy of the Bills of Lading

The presiding officer has also erred in finding that, "assuming, arguendo, that a violation of 40 C.F.R. § 80.27(b)(2) may be 'detected at a carrier's facility' within the meaning of 40 C.F.R. § 80.28(b) by inspecting documents at the carrier's facility, Complainant has not demonstrated that documents inspected at Commercial Cartage's facility showed the violations alleged in Complainant's first claim for relief." See Initial Decision, p. 43, para. 2, and pgs. 44 and 45.

The presiding officer erred in finding that the bills of lading, which stated that "GASOLINE NOT MARKETABLE IN 7.8 RVP CONTROL AREAS", were not found at Commercial Cartage's facility. Mr. Simpkins testified that he found and copied Commercial Cartage's copies of the HWRT bills of lading. [Simpkins, Tr. 1 p. 79 lines 7-15, p. 80 lines 1-4, p. 44 lines 5-21, p. 30 lines 4-6]. During all relevant times, Commercial Cartage was a common (truck) motor carrier and, as such, was subject to rules and regulations of the former Interstate Commerce Commission, now the Surface Board of Transportation, the Department of Transportation.

[Harbison, Tr. 2, p. 14 lines 23-24, p. 15 - 17 lines 1-9].

As required by the Interstate Commerce Commission, and now the Surface Transportation Board, 49 C.F.R. Part 1051,

Every motor common carrier shall issue a receipt or bill of lading for property tendered for transportation in interstate or foreign commerce containing the following information: (a) Names of consignor and consignee.
(b) Origin and destination points.
(c) Number of packages.
(d) Description of freight.
(e) Weight, volume, or measurement of freight (if applicable to the rating of the freight).

The carrier shall keep a record of this information as prescribed in 49 CFR part 1220.

According to Part 1220-139-Preservation of Records, the motor carrier is required to preserve the bill of lading, for one (1) year.

The bill of lading is a multiple page document. In this particular case, each party in the gasoline distribution system received a copy: the terminal HWRT, the motor carrier Commercial Cartage, and the retail outlet Unocal W 70. For convenience and because the letter head on the bills of lading is HWRT's, Complainant has referred to this document as the "HWRT's Bills of Lading". [Tr. 1 p. 24 lines 19-24,

p. 25 lines 1-19].

The evidence shows that the bill of lading was generated in the following manner: Commercial Cartage's truck driver brought a delivery ticket to HWRT and used the information scribed on the delivery ticket to key in certain information into HWRT's computer at the loading rack. [Lewis, Tr. 2, p.88-91; Harbison, Tr. 2, p. 22 lines 14-19; 23, 27, 35-36; Weber, Tr. 1, 122-126]. This information showed Commercial Cartage's truck driver what loading card to use, what volume and type of gasoline to load, and where to transport the gasoline. [Id.]. As a result of the information provided by Commercial Cartage's truck driver, HWRT's computer generated the bill of lading. [Id.]

After Commercial Cartage loaded the gasoline onto the truck, a Commercial Cartage facility, Commercial Cartage took possession of the gasoline and Commercial Cartage's bill of lading. [Id.]. As is the normal business practice, the driver entered the driver's room, signed the HWRT bill of lading, left a copy of the bill of lading at HWRT, took copies of the bills of lading with him, and left with the gasoline. Commercial Cartage's copy of the HWRT bill of lading remained in Commercial Cartage's possession in Commercial Cartage's truck facility with the driver until he delivered the gasoline to the retail outlet. At the retail

outlet, Commercial Cartage had the retail outlet's cashier sign the bill of lading and delivery ticket to acknowledge receipt of the gasoline. [Lewis, p. 154, p. 158 lines 21-23, p. 159 - 160 lines 1-10; Harbison, Tr. 2 p. 39 lines 8-19]. Commercial Cartage's copy of the bill of lading and the delivery tickets were returned to Commercial Cartage's office for preservation, examination, and accounting.

[Lewis, Tr. 2, p. 96 2-24, p. 97 lines 1-10, p. 99 lines 13-22, p. 100 lines 4-24, p. 101 lines 1-4, p. 102 lines 8-13]. All the bills of lading introduced into evidence, Comp. Ex. 2, except for two were signed by the retail outlet's cashier. The cashier at the retail outlet, nor having any physical contact with HWRT, would not have signed HWRT's copy of the bills of lading, but would have signed the bill of lading presented by Commercial Cartage. The bill of lading once signed by Commercial Cartage and used by Commercial Cartage to transport the gasoline, and/or to collect its payment for the transportation of the gasoline was Commercial Cartage's copy of the bill of lading.

Therefore, any conclusion that only HWRT's copy of the bill of lading was examined or introduced into evidence is not supported by the record.

D. Commercial Cartage's Transportation of the Noncomplying Gasoline Was Either Intentional or Negligence.

The presiding officer's findings that the violations cited in claims 2 and 3 were not intentional or negligent is not supported by the volatility regulations or the record. Under the volatility regulations, carriers have a regulatory duty not to transport gasoline that exceeds the applicable standard. The regulations implicitly require carriers to: (i) make reasonable efforts to know the Rvp of the gasoline that it is transporting, (ii) make reasonable efforts to know the applicable Rvp standard for the area where it transports gasoline, and (iii) make reasonable efforts to prevent the transportation of gasoline that exceeds the applicable standard.

This case is analogous to *Tifton Mobil*, CAA (211)-118, notwithstanding that *Tifton Mobil* involved retailers' compliance with § 80.22(a) of the fuels regulations, not carriers. The legal duty and liability scheme for section 80.22(a) provisions are similar in every material respect with the legal duty imposed by § 80.27(a) and the liability scheme. Section 80.22(a) provides, in pertinent part, that "no retailer or his employee or agent shall sell, dispense, or offer for sale, . . . nor shall he introduce or cause or allow the introduction of unleaded gasoline." Section 80.27(a)(1) provides that no carrier shall transport, and section 80.27(a)(2) provides that no person shall transport gasoline whose Reid vapor pressure exceeds the

applicable standard. The liability scheme is also parallel, e.g., where the violation is detected at a retail outlet the retailer shall be deemed in violation, except as provided in paragraph . . . The retailer must demonstrate that the violation was not caused by him or his employee or agent. The *Tifton* decision also considered three (3) issues that are applicable in this case: (a) Must EPA establish a specific intent to commit the violation; (b) if no such intent is required, what legal duty does the party have to prevent the violation; and (c) did the parties efforts to prevent the violation meet that legal duty?

In the *Tifton* decision, Judge Jair S. Kplan, (retired), p. 6, noted that the fuels regulations only imposed civil penalties, and ruled that "no particular state of mind is a prerequisite to liability under the Act and the regulations promulgated thereunder. There is no explicit or implicit requirement that the action or inaction giving rise to any alleged violations must have been intentional, willful, or with knowledge aforethought." ALJ Kaplan rejected the retailer's argument that his lack of specific intent to violate the regulations absolved him from liability. ALJ Kaplan ruled that:

The duty is not a subjective standard, excusing any misintroduction, so long as the retailer remained or proceeded in ignorance, without regard as to whether or not any good faith attempts to ascertain the fuel requirements of the vehicles have actually been made. Such a standard would tend to reduce or negate the affirmative obligations

of the retailer ... and improperly shift his own responsibilities ... A mandatory legislative policy would be transformed into a voluntary program. This approach is quite incompatible with the basic regulatory objective of the Act, to prevent the introduction of leaded gasoline into cars designed for use solely with unleaded gasoline and thereby avoid pollution and promote and improve the quality of the environment. *Tifton*, p. 6.

The ALJ ruled that the Respondent's conduct should be governed by an objective standard of due care.

Under such a test, ... the retailer has an affirmative duty to take reasonable steps to ascertain the type of fuel required ... and reasonable precautions to guard against misintroduction of fuel. It is noted that such a standard is analogous to the negligence standard in tort law and, there as here, it reduces the element of the immediate physical cause to its proper relative position and significance. Application of any other standard would potentially excuse, not only wanton and reckless behavior, but also indifferent, careless, negligent, or unreasonable actions taken, or the failure to act, . . . *Tifton*, p. 7-8.

ALJ Kaplan further ruled that:

a retailer must, in addition, establish that he acted with care and prudence, taking all reasonable precautions, to prevent misintroduction of gasoline. In other words, to escape liability, he must show that he did not cause . . . the violations, in the broad sense of these terms -- that he was not or could not be found at fault for the occurrence by reason of the measures taken which would have been reasonably expected to prevent the violations. *Tifton*, p. 8.

In this particular case, Complainant is making similar

arguments as in the *Tifton* case. Commercial Cartage intended to transport the gasoline from HWRT to the branded retail outlet, (i.e., Commercial Cartage fully intended to comply with Unocal's request to pick up gasoline from HWRT and to transport the gasoline to the branded retail outlet). Commercial Cartage did not take reasonable efforts to ensure that the gasoline it was transporting complied with the applicable Rvp standard, and that Commercial Cartage did not act with due care and prudence, taking all reasonable precautions, to prevent the transportation of noncomplying gasoline.

First, Commercial Cartage's President, Mr. Lewis testified that Commercial Cartage determined the means and content of the communication concerning the shipment of gasoline⁷. Therefore, Commercial Cartage had the opportunity and means to establish

⁷ Mr. Lewis testified that "on an administrative level, we would receive information from a shipper about the quantities of gasoline we could expect to transport and the locations of the facilities where that shipper would place gasoline for us to pick up for delivery to either named or any unnamed points that they would anticipate selling gasoline, and then they would, we would trade such information as is required to make sure that the billing was handled properly, that any internal documents were traded and, you know, in a timely manner, and then we would work together to make sure that those things were accomplished that would allow Commercial Cartage to have access to the facilities from which the gasoline was to be distributed, and by that I mean any kinds of loading cards or authorizations or insurance certificates or drivers records or any number of different documents that could be required by any of the parties to the transaction. And then we would establish the means by which the shipper would communicate its daily requirements to our dispatch center." [Lewis, p. 88 lines 15-24, p. 89 lines 1-11].

Mr. Lewis further testified that,

"Well, after we've done all that *work on the front end*, then a simple phone call would suffice to take care of individual shipments."

communication safeguards to prevent itself from transporting noncomplying gasoline. Moreover, Commercial Cartage could have ensured that it received, in a timely manner, information concerning the Rvp of the gasoline and the applicable standard for the area where the gasoline would be transported. Commercial Cartage and Unocal should have discussed and decided what information and documents would be exchanged to communicate and ensure that during the high ozone season the gasoline ordered and transported would comply with the applicable standard. At a minimum, during the high ozone season, it should have been agreed that when Unocal requested delivery of gasoline from Commercial Cartage, Unocal would specify the Rvp of the gasoline to be transported along with specifying the volume and type of gasoline.

Commercial Cartage also failed to establish communication safeguards between its dispatchers and truck drivers to prevent itself from transporting gasoline that exceeded the applicable standard. Since Commercial Cartage used its delivery tickets⁸ to

⁸ Mr. Lewis testified that the delivery tickets were designed by a quality committee at Commercial Cartage. The purpose of the delivery tickets were "to transmit information both to the drivers about what his assignment was, and also to capture information about activities, both loading the truck and making deliveries. ... And to verify that both the, that all the parties involved in the shipment have those different increments of facts." [Tr. 96 lines 3-24]. Mr. Lewis also testified that Commercial Cartage provided a pad of the delivery tickets to the truck driver who kept the forms in his truck or elsewhere. [Tr. 2, p. 97]. The truck driver was instructed to start filling out

show what Unocal had ordered and to communicate to the truck drivers, Commercial Cartage's delivery tickets should have specified the Rvp of the gasoline along with the volume and type of gasoline. The truck driver, then, along with ensuring that he had the correct volume and type of gasoline, could have checked to see if the Rvp of the gasoline was 7.8 psi. However, Commercial Cartage's delivery tickets do not specify the Rvp of the gasoline. [Comp. Ex. 3]. Commercial Cartage could have determined the Rvp of the gasoline, not by sampling and testing the gasoline, but by making observations, asking HWRT the Rvp of the gasoline before loading on June 1st, and by examining the bills of lading after loading. Commercial Cartage introduced no evidence into the record that it had established any of these communication safeguards to prevent itself from transporting gasoline that exceeded the applicable Rvp standard.

Second, Commercial Cartage was required to have certain compliance information and knowledge independent of its business relationship with Unocal. Commercial Cartage was a truck carrier for several years. Mr. Lewis testified that in 1992, for the St. Louis area alone, Commercial Cartage served about 50 shippers, picked up gasoline from 12 to 15 distribution terminals, and transported gasoline to several hundred retail

the form when he received a telephone assignment, to have the form right in front of him and to fill this out as his receiving instructions from his dispatcher. [Tr.2, 97].

outlets. [Lewis, Tr. 2, p. 88 lines 1-7, p. 92 lines 8-10, p. 115 lines 4-21]. Therefore, Commercial Cartage should have known that bills of lading contained a description of the gasoline, including the Rvp of the gasoline⁹. Nonetheless, Commercial Cartage failed to require, instruct, or even encourage its drivers or personnel to examine the bills of lading to ensure that Commercial Cartage was not violating the volatility regulations by transporting high Rvp gasoline into areas that required low Rvp gasoline. [Tr. 2 p. 116-117]. Commercial Cartage should have known that certain distribution terminals supplied 9.0 Rvp control gasoline and/or 7.8 Rvp control gasoline, but Commercial Cartage failed to ascertain from HWRT the Rvp of the gasoline that it was transporting from HWRT. Commercial Cartage should have known the applicable Rvp standards for the areas where it transported gasoline.

Third, Commercial Cartage failed to provide any Rvp training and specific instructions to its dispatchers and truck drivers to ensure that they were distinguishing 9.0 Rvp control areas from

⁹ Mr. Ackerman testified that two of the methods that terminals used to ensure that the proper gasoline was supplied to retail outlets were to post signs and put designations on their invoices. [Tr. 1, p. 171]. Therefore, Commercial Cartage picking up gasoline from 12 to 15 terminals in the St. Louis area would have been familiar with these signs.

In addition, the preamble to the regulations and EPA's Q & A Document stated that when EPA conducted investigation to determine compliance with the applicable Rvp standards, EPA will review shipping documents concerning where and when the party intended the product to be dispensed to motor vehicles. Q&A, Inspections, p. 43, and Applicable RVP Standards, p.5.

7.8 Rvp control areas during the high ozone season. The President of National Tank Truck Carriers Association, Mr. Harbison, testified that he would not expect a professional truck driver to know the Rvp control areas. Thus, Rvp training should have been provided to the dispatchers and truck drivers because it would be unreasonable for Commercial Cartage to expect an untrained dispatcher or truck driver to be able to distinguish 9.0 Rvp control areas from 7.8 Rvp control areas. In addition, Commercial Cartage failed to provide a map that distinguished 9.0 Rvp control areas from 7.8 Rvp control areas. Since the truck carrier business is basically a short haul business, a simple map of the area that distinguished the boundaries of the two Rvp control areas in the St. Louis area would have sufficed to inform Commercial Cartage's personnel of the Rvp control areas. For example, on Defendant's Ex. A, Commercial Cartage could simply have highlighted in one solid bright-transparent color Franklin County, Jefferson County, St. Charles County, St. Louis County, and St. Louis, and labeled this color 7.8 Rvp control areas. Then, any professional truck driver or dispatcher would have been able to look at the map and see that Foristell, Missouri is located in St. Charles County, a 7.8 Rvp control area. Commercial Cartage failed to require, instruct, or encourage its drivers to read the warning signs on display in the driver's room at the gasoline distribution terminals, to examine the bills of

loading for Rvp requirements, and to become familiar with the Rvp control areas for the accounts or retail outlets that the driver was assigned to and repeatedly delivered gasoline.

Fourth, Commercial Cartage failed to include any language in its leasing agreements with parties, such as - M & R Trucking (Resp. Ex. F), advising these parties of the requirements of the volatility regulations and their duty not to transport gasoline that exceeds the applicable standards. According to Mr. Lewis, Commercial Cartage drafted the leasing agreements and most of its trucks were leased, and the leasing company provided the drivers. [Tr. 2, p. 76-82]. Therefore, the agreement should have embodied the essence of the agreement between Commercial Cartage and its agents. However, the agreement did not mention Rvp compliance or the fuels regulations.

Fifth, Commercial Cartage knew that in its business errors and mistakes could occur and some people could be unscrupulous. [Lewis, Tr. 2, p. 95]. However, in order to prevent itself from transporting gasoline that exceeded the applicable Rvp standard, Commercial Cartage did not make reasonable efforts to identify the apparent Rvp mistakes of its well meaning and credible shippers and/or identify unscrupulous parties who would market 9.0 Rvp gasoline in 7.8 Rvp control areas by periodically reviewing bills of lading. [Tr. 2, p. 117].

Responding to the question, "Did the company take any steps

to inform the dispatchers and/or drivers about the federal EPA's fuel volatility regulations?", Mr. Lewis testified that Commercial Cartage posted a sign in the driver's room right outside the dispatch office. [Lewis, Tr.. 2, p. 107 lines 17-24]. Mr. Lewis did not provide any testimony on the contents of the sign. However, the evidence clearly shows that the existence and content of the sign was not known by Commercial Cartage's key personnel. The inspector, Mr. Simpkins, testified that upon arriving at Commercial Cartage he introduced himself and asked to speak to the person in charge. [Simpkins, Tr.. 1, p. 23 lines 1-6]. At that time, Mr. Kenneth Baer was represented as the person in charge. Mr. Lewis also testified that Mr. Baer was the most knowledgeable and experienced person at Commercial Cartage in dealing with EPA. [Lewis, Tr.. 2, p. 119 lines 20-24, p. 120 lines 1-23]. The evidence shows that Mr. Baer did not know the applicable standards for Rvp control areas. [Comp. Ex. 10]. Moreover, the inspectors went to Mr. Baer with their findings, after determining that Commercial Cartage picked up the high Rvp gasoline and transported it to a low Rvp control area. Mr. Baer responded that Commercial Cartage was never made aware of the regulations pertaining to transporting gasoline at 9.0 RVP to areas that can only accept 7.8 RVP. [Comp. Ex.. 10]. Therefore, it may be inferred that the sign did not distinguish 9.0 RVP control areas from 7.8 RVP control areas, and/or that Commercial

Cartage failed to take reasonable steps to ensure that its personnel was aware of the sign's content.

Mr. Lewis also testified that the drivers, such as Mr. McKernan, received their orders from Commercial Cartage's dispatcher over the telephone. [Lewis, Tr..2, p. 90 line 24, p. 91 lines 1-24, p. 92 lines 1-7, p. 95 lines 22- 24, p. 96 lines 1-24, p. 97 lines 1-12]. Therefore, the drivers or Mr. McKernan may not have seen the sign, or had an opportunity to observe the sign prior to being dispatched to transport gasoline. In addition, since the sign was outside the dispatcher's office, the dispatcher may not have had the opportunity to read the sign while dispatching truck drivers to transport gasoline.

Mr. Lewis also testified, on direct examination, that every other week a letter was included in the payroll of Commercial Cartage's employees and drivers, and the letter communicated all kinds of things, including safety and environmental issues. Mr. Lewis specifically recalled that he shared the information with his employees about seasonal changes with the Rvp regulations, and stated that "if they had any reason to suspect that the gasoline that they were going to deliver or that the transaction which they were engaged, about to be engaged was not consistent with the regulations, that they were to call the dispatcher." [Tr. 2, p. 107-108]. The seasonal change for the Rvp regulations or the high ozone season for Rvp is from June to

September 15th. An example of the payroll notice was not introduced into evidence and Mr. Lewis' testimony indicates that the payroll notice was general in nature, including safety and environmental issues. As an employee of Commercial Cartage, Mr. Baer should have received a payroll notice that should have informed him that certain areas were 9.0 Rvp control and others were 7.8 Rvp control areas. However, as the record reflects, Mr. Baer was unaware of these differences between the Rvp control areas. Therefore, it should be inferred that the payroll notice did not distinguish 9.0 Rvp control areas from 7.8 Rvp control areas and/or was not sufficient to notify the employees of the Rvp requirements. It may also be inferred that Mr. McKernan did not receive the notice because under the lease agreement with M & R Trucking, the owner of the truck provided the driver [Tr. 2, p. 80], and Commercial Cartage paid M & R Trucking, [Tr. 2, p. 82], not the driver. In addition, on cross-examination, Mr. Lewis testified that he did not know if a driver had called Commercial Cartage and said he was asked to deliver higher Rvp gasoline to a lower Rvp control area. [Lewis, Tr.. 2, p. 116 lines 4-7]. Therefore, it can reasonably be concluded that Commercial Cartage's oversight was nonexistent or cursory at best.

In addition, on cross-examination, Mr. Lewis clarified that just prior to the beginning of the Rvp season, he sent out a letter reminding Commercial Cartage's drivers that "there are

unusual rules that have to do with the recipe of the gasoline that's distributed in our area, and that we make every effort to make sure that it, that the assignments that they receive are consistent with those regulations, and if they have any questions, to call and ask us." {Tr.. II at 119, emphasis added}. Complainant contends that the "unusual rules" communication concerning the recipe of gasoline, not even the Rvp of the gasoline, did not establish a policy or provide guidance or instructions to ensure that Commercial Cartage did not transport gasoline that exceeded the applicable standard. Also, Mr. Lewis in his reminder letter assured the drivers that Commercial Cartage has "made every effort" to make sure that the assignment being given to him is consistent with the regulations. [Tr.. II at 119]. However, as indicated earlier, Commercial Cartage did not make reasonable efforts in making contracts or arrangements and with Unocal and truck drivers to transport the correct Rvp gasoline to the branded retail outlet.

The presiding officer has committed reversible error in finding that "it was not negligent for CCC to depend on the instructions of the shipper (Unocal) and thereby presume the legality of the shipment and to deliver the gasoline as specified in the bill of lading." [Initial Decision, p. 52]. The evidence shows that Unocal did not provide any instructions to Commercial Cartage concerning the Rvp of the gasoline. Unocal merely

requested that Commercial Cartage transport from HWRT to the branded retail outlet a certain volume of premium or regular unleaded gasoline. The bills of lading that Commercial Cartage signed, took possession of, and used to transport the gasoline described the gasoline as not being marketable in a 7.8 Rvp control area. Courts have held that the bills of lading represents the contract between the carrier and the shipper. In *Chicago R.I. & P. Ry. Co. V. Geissler*, 61 P. 2d 14 (Okla. 1936), the Court, citing the Supreme Court of the United States in *Am. Ry. Express Co. V. Lindenburg*, 260 U.S. 584 (), held the bill of lading under which the goods were shipped and paid for was the contract of the parties. Therefore, if we are to presume anything, it should be that Commercial Cartage agreed to transport gasoline that was not marketable in a 7.8 Rvp control area to a 7.8 Rvp control area.

The presiding officer cites 13 Am. Jur. 2d Carriers § 235 and 49 U.S.C. § 14101, formerly 49 U.S.C. § § 301 et seq., for the general rule that a carrier's responsibility for the cargo attaches when the loading is complete and a bill of lading signed. *Mattel, Inc. v. Interstate Contract Carrier Corp.*, 722 F. 2d 17 (2nd Cir. 1983). Commercial Cartage's responsibility for the cargo attached several times throughout the high ozone season. Therefore, if after the first loading and signing of the bill of lading the carrier's responsibility attached, it remained

attached for all the other subsequent deliveries. Commercial Cartage cannot ignore observable facts: Commercial Cartage should have known that Foristell, Missouri was located in a 7.8 Rvp control area, and that the gasoline it was transporting was not marketable in a 7.8 Rvp control area.

Moreover, Complainant avers that the regulations do not allow carriers to presume that the gasoline it transports complies with the standards. Rather, as the *Tifton* Court found, Commercial Cartage must exercise due care and prudence in meeting its regulatory duty not to transport gasoline that exceeds the applicable standard. Complainant, therefore, contends that the violations were due to Commercial Cartage's negligence. That is, Commercial Cartage had a regulatory duty not to transport gasoline that exceeded the applicable Rvp standard. Commercial Cartage breached its regulatory duty when it transported noncomplying gasoline, and when it failed to exercise due care and prudence, taking all reasonable precautions to prevent itself from transporting noncomplying gasoline, and this failure was the direct cause of the violations.

V. Commercial Cartage Transported the Noncomplying Gasoline to the Branded Retail Outlet.

Complainant has shown by a preponderance of the evidence that Commercial Cartage transported the noncomplying gasoline to the branded retail outlet with respect to violations alleged in the second claim. Mr. Mark Kaiser, the president of St. Louis

West 70 Truck Plaza, Inc., testified that he has worked full time at the retail outlet since 1978, and that his responsibilities included the overall management of the facility and the departments. Mr. Kaiser repeatedly identified Commercial Cartage as the carrier that delivered gasoline to the retail outlet. [Kaiser, Tr.. 1 p. 151 lines 21-24].

Q. Okay. Who delivered gasoline to the gas station there on, between the months of June and August of 1992?
A. Commercial Cartage.

[Kaiser, Tr.. 1 p. 152 lines 1-3]

Q. Did anyone else bring, deliver gasoline to the station?
A. Not that I'm aware of.

Mr. Kaiser can only testify to his knowledge or awareness. As the overall manager of the facility and departments, he would have known who delivered gasoline to the retail outlet.

[Kaiser, Tr.. 1 p. 156 lines 23-24, p. 157 lines 1-3]

Q. Who ordered or requested deliveries of gasoline in 1992?
A. Unocal.
Q. From where?
A. From Commercial Cartage.

[Kaiser, Tr.. 1 p.157 lines 9-19].

Q. How would they know that a delivery was required?
A. Through inventory.
Q. Did you keep the inventory?
A. Commercial Cartage and we kept the inventory.
Q. So you had, so you - let me get this straight. You or, as the operator of the gas station, did not direct or request delivery of gasoline from Commercial Cartage, is that right?
A. That is correct.

A common carrier would not keep the inventory of gasoline at a retail outlet if he occasionally delivered gasoline to the retail outlet. Rather, Mr. Lewis testified that:

There were also some customers for whom we provided additional service setting up these, sort of these macro arrangements, and then those customers would entrust us with the obligation or the privilege of making sure that their retail facilities had sufficient gasoline to sell at all times. [Tr. 2, 89].

The evidence shows that Commercial Cartage kept an inventory of the gasoline sold at the retail outlet, provided this information to Unocal so that Unocal would know when to order gasoline from Commercial Cartage, and Commercial Cartage assigned one driver, Charles McKernan, to service the account. [Tr.. 2 p. 91 lines 18-22].

The evidence further shows that Commercial Cartage made many more deliveries other than the nine (9) deliveries that are the subject matter of this case. Mr. Ackerman testified that he reviewed several other bills of lading, delivery tickets, and invoices showing that Commercial Cartage transported gasoline from HWRT to St. Louis W 70. Mr. Ackerman also explained that EPA applies a .3 psi test tolerance, because of testing uncertainties, and would not proceed with a violation that was not supported with a test result of at least 8.1 psi. [Ackerman, Tr. 1, p. 177 lines 16-24, p. 178 lines 1-12]. Therefore, whenever the gasoline exceeded 8.1 psi, Respondent was cited for

a violation¹⁰. Complainant has submitted, bill of lading # 71385, showing that Commercial Cartage transported the gasoline from HWRT five (5) days prior to when EPA sampled gasoline at the branded retail outlet. The test results showed that the premium and regular unleaded gasoline exceeded the applicable Rvp standard. [Comp. Ex. 5]. Respondent has not introduced any evidence that any other carrier made deliveries to St. Louis W 70.

The presiding officer also based his finding that some other carrier delivered gasoline to Commercial Cartage stating that "Complainants tests results on the regular and premium gasoline sampled at the retail station were 'substantially' in excess of the Rvp of HWRT's tests results. The presiding officer found that "[t]his tends to support the notion that some carrier may have delivered gasoline to Union W 70 between July 24 and August 31, 1992. This is an erroneous inference because the presiding officer fails to consider that HWRT and EPA used two different test methods. HWRT used test method ASTM D 323 to determine compliance, while Complainant used two Herzog Semi-Automated

¹⁰ As shown by Comp. Ex. 2, on June 17th, bill of lading ("BOL") 062927, the regular gasoline had a Rvp of 8.1 psi, but Respondent was only cited for the premium gasoline that had a Rvp of 8.2 psi; on July 20th, BOL # 004980, the premium gasoline had a Rvp of 8.1 psi, but Respondent was only cited for the regular gasoline that had a Rvp of 8.5 psi; and on July 24th, BOL # 066725 the premium gasoline had a Rvp of 8.1 psi, but Respondent was only cited for the regular gasoline that had a Rvp of 8.5 psi.

Method 2 tests on each sample to determine compliance. The Herzog Semi-Automated Method 2 gives a more accurate and higher measurement than the ASTM D-323 test method. The EPA's National Vehicle Emissions Laboratory ("NVEL") and ASTM have found that a relative bias exists between the Rvp test methods used by HWRT and EPA. This bias is summarized in ASTM D 4953-93, Standard Test Method for Vapor Pressure of Gasoline and Gasoline-Oxygenate Blends (Dry Method). Applying the relative bias correlation equation of paragraph 10.2.2.2 of ASTM D 4953 to EPA's regular gasoline test result of 8.82 psi and EPA's premium gasoline test result of 8.65 psi yields expected values of 8.68 psi and 8.51 psi, respectively, which would be acquired using HWRT's test method.

In addition to the relative bias expected between the different test methods used, there is reproducibility variation expected between EPA's lab and HWRT's lab and between the test takers. ASTM D 4953-93 states in paragraph 10.1.2, "the difference between two single and independent test results obtained by different operators working in different laboratories on identical test material would, in the long run, in the normal and correct operation of the test method, exceed [0.80 psi] only in one case in twenty." Considering that HWRT's test results for the same material specified above were 8.2 psi and 8.3 psi, respectively, the EPA and HWRT test results are well within the

expected testing variation. Therefore, Complainant's test results are not substantially in excess of HWRT's tests results. Rather, the test results are what you would expect after considering the bias and the reproducibility variation.

CONCLUSION

For the foregoing reasons, Complainant requests that the Environmental Appeals Board reverse the presiding officer's Initial Decision and find that the Respondent is liable for all the violations cited in Claims One and Two of the Amended Complainant or, in the alternative, that Respondent is liable for all the violations cited in Claim Three of the Amended Complaint and that the case be returned to the presiding officer for the determination of an appropriate civil penalty.

Respectfully submitted,

Date: 9/30/97

Bruce C. Buckheit

Bruce C. Buckheit, Director
Air Enforcement Division

Date: 9/29/97

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